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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL P. RUBIN, Plaintiff and Appellant, v. MICHAEL A.J. NANGANO et al., Defendants and Respondents.	B206028 (Los Angeles County Super. Ct. No. BC370836)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Michael P. Rubin & Associates and Michael P. Rubin for Plaintiff and Appellant.

Burke, Williams & Sorensen, Richard R. Terzian and Jodi Chapin Lumsdaine for Defendants and Respondents Michael A.J. Nangano, Bruce J. Tackowiak, John William Streeter, Streeter & Nangano, Robin Fauser, Aldo Palmieri and Mary Ossanna.

Michael P. Rubin appeals from a judgment entered following the trial court's orders granting a special motion to strike his complaint pursuant to Code of Civil Procedure section 425.16[1] and awarding attorney fees and costs to the successful moving parties. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Venouziou/Fauser Litigation*

This case arises from protracted litigation between Silvana Vienne Venouziou and her lawyer, Rubin, on the one hand, and Venouziou's former tenant, Robin Fauser, her housemates, Aldo Palmieri and Mary Ossanna, and their lawyers, on the other hand. The litigation started when Venouziou reneged on Fauser's option to purchase the home she and her housemates were renting from Venouziou. In May 2002 Fauser, represented by the law firm, Streeter & Nangano, and its attorneys Michael Nangano, Bruce Tackowiak and John William Streeter (collectively the lawyer defendants), sued Venouziou, who retained Rubin to represent her. Following an August 2003 bench trial, the trial court entered a judgment ordering specific performance of the option agreement and awarding attorney fees to Fauser. That judgment was subsequently affirmed on appeal. (See *Fauser v. Venouziou* (May 9, 2006, B172637) [nonpub. opn.].) In the interim, Venouziou, again represented by Rubin, filed an unlawful detainer action against Fauser, Palmieri and Ossanna seeking to evict them from the house and to recover rents Venouziou claimed were owed under the lease. That lawsuit was stayed pending the outcome of the original action and was ultimately dismissed in November 2003.

In August 2004 Rubin filed a third action on behalf of Venouziou against Palmieri and Ossanna (but not Fauser) seeking to recover rents for living at the property, even though Fauser had already been declared the owner of the property in the original purchase option action. Although Rubin knew Palmieri and Ossanna had been represented by the lawyer defendants in the unlawful detainer action, he chose not to ask them to accept service on Palmieri and Ossanna's behalf. Instead, as reflected in a

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[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

declaration filed in support of his application for a default judgment on behalf of Venouziou, a process server retained by Rubin purported to effect substituted service, after failing to serve Palmieri or Ossanna at the property, by serving a woman Rubin claimed fit the description of Fauser.[2] Ossanna and Palmieri never responded to the complaint. On December 27, 2004 the clerk entered a default judgment for $122,851.59 in favor of Venouziou.

Neither Rubin nor Venouziou took any action to enforce the default judgment until early 2007 when a different lawyer representing Venouziou attempted to conduct debtors' examinations of Ossanna and Palmieri. Nangano appeared at the examination location and advised the lawyer the default judgment had been improperly obtained. The new lawyer withdrew from the matter, and Nangano sent a letter to Rubin demanding he and Venouziou cooperate in having the default judgment set aside. Rubin, writing in answer on behalf of Venouziou, refused to set aside the default judgment and threatened to "pursue . . . any attempts at perjury by you and your purported clients." Nangano responded in kind on May 2, 2007, writing: "We are in receipt of your most recent correspondence. It may seem hard to believe given your behavior in the matter of *Fauser v. Venouziou*, but the passage of time had dimmed my recollection somewhat as to just how profoundly mentally disturbed you are. I look forward with relish to the opportunity to defeat you as thoroughly as my office did in the *Fauser v. Venouziou* matter."

2. *The Rubin/Nangano Litigation*

Rubin took exception to Nangano's letter and sued Fauser, Palmieri and Ossanna and all the lawyer defendants for libel and intentional infliction of emotional distress.[3]

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[2] According to the declaration of the process server, he served a summons for Ossanna on "Jane Doe, Female, Caucasian, 31 yrs., 5'5", 119 lbs., blonde" at the property address and a summons for Palmieri on the same woman at Palmieri's alleged business address, a shop called "Chestnuts & Papayas." He also mailed copies of the summons and complaint to both locations.

[3] Although Rubin did not serve his complaint, Fauser, Palmieri, Ossanna and the lawyer defendants learned it had been filed and appeared in the action rather than risk entry of a default.

According to Rubin's complaint, the defamatory letter, which was "patently outrageous" and designed "for the sole purpose of insulting, humiliating and causing severe emotional distress" to him, was published to his own employees, as well as various employees of Streeter & Nangano.

Fauser, Palmieri, Ossanna and the lawyer defendants demurred to the complaint, and, after the hearing was continued by stipulation, filed a special motion to strike under section 425.16. Both were heard and granted at a hearing on October 3, 2007. As explained in the court's lengthy tentative decision, which it adopted as its final ruling at the hearing, Nangano's letter was a pre-litigation statement made in connection with efforts to set aside the default judgment and thus fell within section 425.16, subdivision (e)(2). Moreover, the court ruled, Rubin was not likely to prevail on the merits of the lawsuit because the challenged comment was absolutely privileged under Civil Code section 47, subdivision (b), and was, in any event, a nonactionable expression of opinion. The court concluded attorney fees should be awarded against Rubin but directed Fauser, Palmieri, Ossanna and the lawyer defendants to file a separate motion documenting the fees incurred.

The separate fee motion was argued on December 6, 2007, after which the court awarded fees in the amount of $23,429. A judgment of dismissal was entered on January 7, 2008. On January 15, 2008 Fauser, Palmieri, Ossanna and the lawyer defendants submitted a memorandum of costs in the amount of $2,514.95. Rubin moved to tax costs on February 4, 2008; that motion was denied on April 8, 2008. Rubin filed a notice of appeal on February 21, 2008.[4]

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[4] Rubin's appeal was filed 141 days after entry of the order granting the special motion to strike, which is immediately appealable. (See §§ 425.16, subd. (i); 904.1, subd. (a)(13).) We requested additional briefing to address whether Rubin's appeal was timely. Asserting it was not, Fauser, Palmieri, Ossanna and the lawyer defendants contend a notice of ruling served on December 13, 2007 triggered the 60-day jurisdictional limitation, rather than the 180-day period after entry of judgment, for filing a notice of appeal. (See Cal. Rule of Court, rule 8.104(a).) Established case law long ago rejected that argument. (See, e.g., *Sadler v. Turner* (1986) 186 Cal.App.3d 245, 248 ["notice of ruling . . . is not a '"written notice of entry of judgment" that would start the

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[5]

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) In ruling on a motion under section 425.16, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).)

In terms of the so-called threshold issue, the moving party's burden is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen*

60-day period running'"]; *Call v. Los Angeles County Gen. Hosp.* (1978) 77 Cal.App.3d 911, 915 [same].) Unless a file-stamped copy of the judgment or other appealable order is served on the appellant, "the document that triggers the 60-day time period to file a notice of appeal must be 'entitled "Notice of Entry."'" (*Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 260.) Because there is no evidence Rubin was served with notice of entry of any order prior to the notice of entry of judgment served on January 30, 2008, the appeal from the October 3, 2007 order granting the special motion to strike is timely.

[5] SLAPP is an acronym for "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

(2006) 37 Cal.4th 1048, 1056; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 616, fn. 10.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Once the defendant establishes the statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon Enterprises, supra,* 29 Cal.4th at p. 67.) In deciding the question of potential merit, the trial court properly considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The question is whether the plaintiff presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Taus,* at p. 714; *Wilson,* at p. 821; *Zamos,* at p. 965.)

"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928 (*Kajima*).) We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1055.)

2. *The Trial Court Did Not Err in Granting the Special Motion To Strike*

a. *The complaint arises from protected speech and petitioning activity*

To satisfy the initial burden on a special motion to strike, the moving party must demonstrate the conduct that forms the basis for the challenged causes of action was an act in furtherance of the right of petition or free speech (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78; *Equilon Enterprises, supra*, 29 Cal.4th at p. 67) and falls within one of section 425.16, subdivision (e)'s four categories: (1) oral or written statements made "before" a legislative, executive, judicial or other official proceeding; (2) oral or written statements made "in connection with" an issue under consideration by a legislative, executive or judicial body or "any other official proceeding authorized by law"; (3) oral or written statements made in a place open to the public or in a public forum in connection with an issue of public interest; or (4) "any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public issue or an issue of public interest." A defendant contending the challenged claims arise from protected activity within either of the first two categories is only required to show his or her statements were made within or in connection with an official proceeding whether or not they concerned an issue of public significance. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113, 1123.) A defendant seeking to strike a cause of action arising from protected conduct described in the final two categories must demonstrate the matter concerns a public issue or an issue of public interest. (*Id*. at pp. 1117-1118; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567.)

Rubin does not dispute Nangano was exercising his right of free speech when he wrote the May 2, 2007 letter. Rubin also acknowledges section 425.16, subdivision (e)(1) and (e)(2), applies to lawsuits arising from an attorney's statements or actions taken on behalf of his or her clients in connection with a matter in litigation. (See, e.g., *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733, 735 [attorney sued for malicious prosecution may invoke protections of § 425.16]; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 907-908 [§ 425.16 applies to attorney's acts or statements made in

connection with environmental lawsuits]; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152-154 [attorneys had standing to bring special motion to strike under § 425.16 based on allegations against them relating to the filing and prosecution of lawsuits because they were exercising free expression rights on behalf of their client]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [attorney met threshold burden under § 425.16 by demonstrating allegations against her arose from statements she made in negotiating a stipulated settlement and in writing a letter on her clients' behalf in connection with pending litigation].) Counseling clients and other activities in anticipation of, or preparation for, litigation are also within the ambit of section 425.16. (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115 ["'[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16'"]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [§ 425.16 applies to law firm's actions in sending a letter to solicit support for a complaint to be filed with the Attorney General's office].)

Asserting the letter was written well after the default judgment in the third action had been entered at a time when there was no pending or anticipated litigation between the parties, however, Rubin challenges the trial court's conclusion Nangano's letter was written in connection with pending litigation or, as he insists it must, for the purpose of furthering the clients' objectives in the litigation.

Like the trial court, we disagree with Rubin's characterization of the proceedings. Whether or not the default judgment was properly obtained or was conclusive, the correspondence that prompted Nangano's May 2, 2007 letter was precipitated by Venouziou's efforts to collect on the judgment. Nangano and his colleague Tackowiak in turn initiated an effort to vacate the judgment that plainly anticipated legal action if Rubin, as Venouzious's counsel, was unwilling—as he proved to be—to convince his client to withdraw the judgment. Viewed in context, Nangano's letter was simply one

part of a lengthy course of vituperative and bitter litigation that unfortunately showed no sign of abating.

Even if the May 2, 2007 letter was a pre-litigation communication, Rubin contends a lawyer's out-of-court statement must serve some purpose related to the litigation to fall within the scope of section 425.16. In other words, the communication must advance the litigant's case in some manner. Rubin contends Nangano's letter had no such purpose. Unable to identify such a requirement in case law discussing section 425.16, Rubin analogizes to the litigation privilege (Civ. Code, §47, subd. (b)), which, he claims, does not apply unless a particular communication "function[s] as a necessary or useful step in the litigation process and . . . serve[s] its purposes." (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146 (*Rothman*).)

Although the Supreme Court has "looked to the litigation privilege as an aid in construing the scope of subdivision (e)(1) and (2)," "the two statutes are not substantively the same." (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 323.) The litigation privilege "enshrines a substantive rule of law that grants absolute immunity from tort liability for communication made in relation to judicial proceedings;" section 425.16, on the other hand, "is a procedural device for screening out meritless claims." (*Flatley*, at p. 324.) Consequently, "Civil Code section 47 does not operate as a limitation on the scope of the anti-SLAPP statute." (*Id*. at p. 325.) Instead, courts have looked directly to the statutory language and legislative intent in construing the reach of section 425.16. For instance, in *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th 1106, the Supreme Court overruled previous appellate decisions construing section 425.16, subdivision (e)(1) and (e)(2), to impose a separate requirement the challenged statement be made in connection with a public issue. As the Court observed, "plainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." (*Briggs*, at p. 1113.) The Court declined to "disturb the bright-line 'official proceeding' test the Legislature has embedded in subdivision (e), clauses (1) and (2)." (*Briggs*, at p. 1122.)

Similarly, based on the plain language of the statute, we conclude there is no requirement under section 425.16, subdivision (e)(2), that the challenged statement "function as a necessary step in the litigation," as Rubin interprets that phrase. The May 2, 2007 letter was unquestionably made in connection with an issue that Nangano anticipated would be under consideration by a judicial body. No more is required to fall within the scope of the statute.

b. *Rubin failed to establish a likelihood he would prevail on the merits of his claims*

Because "the challenged cause of action [arose] from protected activity" (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056), the burden shifted to Rubin to establish he was likely to prevail on his claims of defamation and intentional infliction of emotional distress. The trial court concluded Rubin was not likely to prevail. We agree.

i) *Libel*

"Libel is a false and unprivileged publication by writing, . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) Assuming the falsity of Nangano's statement that Rubin was "profoundly mentally disturbed," Rubin must still establish the statement was published to others (see, e.g., *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 45 ["[p]ublication is a necessary element of all defamation claims"])[6] and was neither privileged under Civil Code section 47,

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[6] Although "publication" includes any repetition of the defamatory statements (*Barrett v. Rosenthal, supra,* 40 Cal.4th at p. 45), there must be some communicative act to a third party for the defendant's conduct to be actionable. (See *Ringler Associates v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179-1180 ["Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to who reference is made. . . . Reprinting or recirculating a libelous writing has the same effect as the original publication."]; accord, *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 27; see 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 529, p. 782; Rest.2d Torts, § 577(1), p. 201 ["[p]ublication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed"].)

subdivision (b), nor a nonactionable opinion. As to the first of these requirements, there is no evidence the non-lawyer defendants (Fauser, Palmieri and Ossanna) published Nangano's statement to anyone else. With respect to those defendants, therefore, the inquiry under section 425.16 is complete.[7] (Cf. *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549 [because evidence, even if taken as true, did not indicate defendant "had a responsible part in the publication of the alleged libel, the [trial] court did not err in ruling that [plaintiff] has failed to demonstrate a probability of prevailing on his libel claim"].)

Rubin fares no better with respect to the lawyer defendants because the challenged statement falls within the absolute protection of the litigation privilege. "The usual formulation [of the litigation] privilege [is that] the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; *Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529 [litigation privilege bars cause of action "provided that there is some reasonable connection between the act claimed to be privileged and the legitimate objects of the lawsuit in which that act took place"].) "The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. [Citation.] . . . [T]he privilege has been extended to . . . *all* torts other than malicious prosecution. [Citations.] . . . [¶] If there is no dispute as to the operative facts, the applicability of the litigation privilege is a question of law. [Citation.] Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian v. Harriman, supra,* 98 Cal.App.4th at p. 913.)

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[7] The complaint contains an agency allegation on which Rubin relies for the dubious proposition Fauser, Palmieri and Ossanna authorized Nangano to "publish" the offensive statement made in the May 2, 2007 letter. Even assuming this allegation was sufficient to subject Palmieri and Ossanna (Fauser's inclusion seems to be wholly gratuitous as she was not named in the default judgment) to vicarious liability for Nangano's statement, they too would be protected by the litigation privilege as discussed below.

As discussed, the May 2, 2007 letter was written in anticipation of probable litigation over the validity of the default judgment and is properly likened to a demand letter. (See *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922.) Nonetheless, Rubin contends, to be protected by the litigation privilege, Nangano's comment regarding his mental health must "function as a necessary or useful step in the litigation process and must serve its purposes" (*Rothman, supra,* 49 Cal.App.4th at p. 1146), which it did not. We disagree. Viewed in context, the letter, including the offensive comment, was sufficiently related to the effort to set aside the default judgment to fall within the scope of the litigation privilege. Discussing this factor in *Silberg v. Anderson, supra,* 50 Cal.3d at pages 219 to 220, the Supreme Court explained "[t]he requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action. [Citations.] The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." (See also *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 865 [for litigation privilege to apply "defamatory matter need not be relevant, pertinent or material to any issue before the tribunal; *it need only have some connection or some relation* to the judicial proceeding"].)

The necessity requirement articulated in *Rothman, supra,* 49 Cal.App.4th 1134 depends upon an understanding of the circumstances of the allegedly defamatory statement at issue in that case. Rothman, an attorney representing a child who claimed Michael Jackson had sexually abused him, sued Jackson after Jackson's lawyers accused Rothman in a press conference of knowingly making fraudulent claims to extort money from Jackson. Jackson and his lawyers claimed the statements were protected by the litigation privilege. The Court of Appeal concluded the statements were not privileged,

even though the statements bore a "logical relation" to anticipated criminal and civil litigation against Jackson. (*Id*. at p. 1145.)

The unusual context of the statements made in *Rothman*—a highly publicized press conference convened for the purpose of salvaging Jackson's reputation and with little import to the litigation—was critical to the Fourth District's recent rejection of a plaintiff's reliance on *Rothman* for the proposition the challenged statement must have an expressly functional purpose related to the litigation in question. (*GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901 (*GeneThera*).) As the court explained, "[t]here is a strong public policy in favor of allowing publications in the course of judicial proceedings regardless of their perceived content. Indeed, our Supreme Court has observed that a communication need not itself be 'accurate' or 'truthful' for the privilege to attach but simply within the 'category of communication permitted by law.' (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 959.) '"To hold otherwise would be inconsistent with the general public purpose of the privilege to encourage the utmost freedom of access to the courts and quasi-judicial bodies."'" (*GeneThera*, at p. 909.) Finding the defendant lawyer's letter to opposing counsel was a privileged communication, the court rejected the plaintiff's reliance on *Rothman*, explaining: "We have no quarrel with *Rothman;* it just does not apply here. Indeed the *Rothman* opinion states that 'the test is satisfied by demand letters and like communications between litigants or their attorneys which are directed toward settlement of a pending or anticipated lawsuit . . . .' ([*Rothman, supra*, 49 Cal.App.4th] at p. 1148.) The communications here in question similarly serve the functional requirement of 'communications . . . directed toward settlement of a pending . . . lawsuit.'" (*GeneThera*, at p. 910.)

Nangano's statement, intemperate as it may have been, was made in correspondence between opposing counsel following Venouziou's attempt to enforce the outstanding default judgment and was part of an effort to avoid litigation to resolve the issue of the judgment's validity. Even if the statement is properly labeled "trash talk," as Rubin himself described it at oral argument, none of the policy concerns arising from the

press conference in *Rothman*, which was wholly unrelated to the merits of the threatened litigation itself, is implicated here. We may lament the impulse that led Nangano to respond in such a manner, or, more precisely, the lapse in judgment that led him to mail the letter once it had been written, but the institution of litigation over what can only be described as a tasteless insult seems to us to be an exaggerated and unwarranted result. Under these circumstances the litigation privilege properly applies to Nangano's letter, and Rubin's libel action therefore is without merit.

ii) *Intentional infliction of emotional distress*

Rubin's claim for intentional infliction of emotional distress also fails to survive the second step of the section 425.16 analysis. Extreme and outrageous conduct, an essential element of the tort (see *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593; *Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, 1133), is behavior "'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) """[I]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery."""" (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.) Nangano's letter, which he likely regrets having ever sent, reveals more about the declining civility in today's legal profession than legitimate insight into Rubin's mental status.[8] Clearly intended as an insult by an opposing counsel who made no pretense of medical or psychological expertise, Nangano's comment was perhaps crude but certainly not actionable. (See, e.g., *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496 ["'the tort does not extent to 'mere insults, indignities, *threats*, annoyance, petty oppressions or other trivialities'"].) Accordingly, the trial court did not err is granting the special motion to strike Rubin's complaint.

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[8] To be fair, Nangano did not start the exchange of petty affronts. Rubin's previous letter to Nangano was equally insulting, cautioning Nangano not to engage in perjury, as if Rubin was accustomed to such behavior from Nangano.

3. *The Trial Court Properly Awarded the Moving Parties Their Attorney Fees*

a. *The motion to set the amount of attorney fees was not barred by section 1008*

Section 425.16, subdivision (c), provides, "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. . . ." The award of attorney fees to the party bringing a successful special motion to strike under section 425.16 is "mandatory." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) "The party prevailing on a special motion to strike may seek an attorney fee award through three different avenues: simultaneously with litigating the special motion to strike; by a subsequent noticed motion, as was the case here; or as part of a cost memorandum." (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461; accord *American Humane Assn. v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095, 1103.)

Rubin argues a prevailing party may proceed on only one of the "avenues" identified in *Carpenter* and insists the trial court was not authorized to direct the filing of a separate fee motion after fees had been requested in the special motion to strike, but the moving parties had failed to establish the reasonableness of the fees sought. According to Rubin, the second motion constituted an improper motion for reconsideration under section 1008.

Rubin's procedural arguments are without merit. The issue in *Carpenter* was solely whether a plaintiff who had successfully defeated a motion under section 425.16 could move for attorney fees after the defendant's appeal of the order denying the motion had been affirmed. The Court of Appeal held the plaintiff's fee motion, filed before entry of judgment concluding the action, was not untimely. (*Carpenter v. Jack in the Box Corp.*, *supra,* 151 Cal.App.4th at pp. 459-460, 468.)[9] Nothing in that decision precludes

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[9] Rubin's reliance on *Johnston v. Corrigan* (2005) 127 Cal.App.4th 553 is equally misplaced. There, our colleagues in Division Five of this court concluded a trial court had jurisdiction under section 1008 to reconsider a previous ruling denying an award of attorney fees under section 425.16, subdivision (c), based on the court's misperception about the record. (*Johnston*, at p. 556.) The Court of Appeal's discussion does not

a court from proceeding, as here, with a separate pre-judgment motion to quantify the fees granted in connection with the motion to strike itself. The court ordered the filing of a separate motion to ensure the quantum of fees ordered was justified—a precaution that benefitted Rubin more than anyone.

Certainly, nothing in section 1008 restricts the power of a trial court to proceed in this manner. As interpreted by the Supreme Court, section 1008 applies only to a party's motion for reconsideration or renewal and not to a court's reconsideration of an order on its own motion. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096-1097.) The "'Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power.'" (*Id.* at p. 1103.) The "legislative purpose is advanced if section 1008 is understood to apply to the actions of the parties, not to a court's sua sponte reconsideration of its own interim order." (*Id.* at p. 1106.) As this court recently explained, "Further briefing at the request of the court, even if it included a renewed motion correcting the statutory basis for the application for attorney fees (also filed at the suggestion of the court), does not implicate Code of Civil Procedure section 1008." (*Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 783.)

Applying this principle in circumstances similar to the case at bar, the court in *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007 affirmed the trial court's fee order after it had first denied the motion without prejudice to refiling the motion with additional billing information. "Denial of a motion without prejudice impliedly invites the moving party to renew the motion at a later date, when he can correct the deficiency that led to the denial. [¶] In this case, the first motion was denied for want of sufficient evidence. The trial court might have continued the motion to allow the [party] to submit a detailed fee bill, but instead it chose to deny the motion with, in effect, leave to renew it upon further evidence. Which route to choose is an

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address Rubin's argument that the trial court lacks authority to order a party seeking attorney fees to file a separate motion to determine the amount of fees to be awarded after an order granting the special motion to strike.

administrative matter of calendar management—some might want to streamline a docket and continue a pending motion to allow supplemental filings, while others might prefer to decide the motion on the existing papers and reconsider that decision in a new motion. In any event, the trial court acted within its powers when, essentially on its own motion, it reconsidered fees and made the instant fee award."[10] (*Id*. at p. 1015.)

b. *The trial court did not abuse its discretion in setting the amount of fees*

An order granting an award of attorney fees is generally reviewed for an abuse of discretion. (See *MHC Financing Ltd. Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1397.) In particular, "[w]ith respect to the *amount* of fees awarded, there is no question our review must be highly deferential to the views of the trial court." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [recognizing trial court's broad discretion in determining amount of reasonable attorney fees because experienced trial judge is in the best position to decide value of professional services rendered in court].) An appellate court will interfere with a determination of "what constitutes the actual and reasonable attorney fees" "only where there has been a manifest abuse of discretion." (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228.)

Rubin argues the trial court abused its discretion by awarding fees related to the demurrers as well as the special motion to strike. (See, e.g., *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 381 ["the fee 'provision [under § 425.16] applies only to the motion to strike, and not to the entire action'"]; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1383 [legislative history of § 425.16

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[10] As we noted in *Doe v. Luster* (2006) 145 Cal.App.4th 139, 144, "it would seem better practice to defer the fee application until the motion to strike has been decided since the fees and costs actually incurred can be determined only after the hearing. ([*American Humane Assn. v. Los Angeles Times Communications, supra*, 92 Cal.App.4th] at p. 1104 ['the moving defendant will be able to more accurately document the fees and costs actually incurred if the amount is fixed at a later date. . . . [T]he total cost of the special motion to strike and any related discovery permitted by the court can be more accurately computed if a section 425.16, subdivision (c) motion for fees is filed after the request is granted.'].)"

"clearly show[s] the Legislature intended that a prevailing defendant on a motion to strike be allowed to recover attorney fees and costs only on the motion to strike, not the entire suit"].) The record reveals the trial court understood this limitation and properly exercised its discretion to reduce the requested award by $5,345.50 for fees related to the demurrers. There was no abuse of discretion by the trial court.[11]

4. *The Cost Award Was Proper*

As discussed, section 425.16, subdivision (c), is intended to compensate a successful moving party for the expense of bringing a special motion to strike the complaint. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362.) To this end, the provision "'is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extracting herself from a baseless lawsuit.'" (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 22; accord, *GeneThera, supra*, 171 Cal.App.4th at p. 910.) Moreover, because the complaint was finally dismissed in favor of the defendants, they are the "prevailing party" entitled as a matter of right to recover costs in this action. (§ 1032, subds. (a)(4), (b).)

Although acknowledging the general principle mandating the award of costs in this case, Rubin argues the costs actually awarded (not including attorney fees) were not reasonable because he never served any of the seven defendants with his complaint and their strategy of voluntarily appearing and demurring and moving to strike under section 425.16 could have been effected by the appearance of only one defendant (thus reducing

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[11] In addition, as successful parties in this appeal, Fauser, Palmieri, Ossanna and the lawyer defendants are entitled to recover attorney fees incurred in connection with the appeal. (See *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287 ["appellate courts have construed section 425.16, subdivision (c) to include an attorney fees award on appeal"]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th at p. 785 ["[s]ince section 425.16, subdivision (c) provides for an award of attorney fees and costs to a prevailing defendant on a special motion to strike, and does not preclude recovery of appellate attorney fees by a prevailing defendant-respondent, those fees are recoverable"]; see generally *City of Los Angeles v. Animal Defense League, supra*, 135 Cal.App.4th at pp. 627-628.)

the total costs sought for appearance and filing fees). This argument is specious. As Fauser, Palmieri, Ossanna and the lawyer defendants point out, they feared Rubin would seek their default just as he had previously done against Palmieri and Ossanna. Moreover, they contend, Rubin could have dismissed the complaint or any of the separately named defendants at the time they first appeared in the case and, perhaps, have negotiated a resolution to the matter that spared him the necessity of paying fees and costs to the prevailing parties. He chose not to do so and even increased his liability by pursuing this appeal. The trial court acted well within its discretion in ordering him to pay the costs incurred.

DISPOSITION

The judgment is affirmed. Fauser, Palmieri, Ossanna and the lawyer defendants are to recover their costs and attorney fees on appeal. The matter is remanded to the trial court to determine the amount of attorney fees and costs to be awarded.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.